85-1660

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GROUP W CABLE, INC.,
NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
AND COX CABLEVISION CORPORATION,
Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Under historic arrangement, public utilities have granted cable television operators licenses to attach wires to surplus space on utility poles. By the 1978 Pole Attachment Act, 47 U.S.C. § 224, Congress authorized the Federal Communications Commission to regulate the rates, terms, and conditions imposed by utilities on cable operators for this service. The questions presented are:

I. Does pole attachment rate regulation constitute a taking *per se* as a government-compelled permanent physical occupation of property where

- the regulated property is public utility plant already subject to permanent physical occupations at regulated rates as the *quid pro quo* for the utility's government-authorized monopoly;
- the utility may reclaim the surplus pole space occupied by the cable operator whenever needed for utility service; and
- the utility voluntarily entered its pole attachment arrangements?

II. May Congress authorize an administrative agency to determine, pursuant to statutory guidelines, just compensation for a taking under the Fifth Amendment to the Constitution, subject to judicial review?

PARTIES TO THE PROCEEDINGS

Respondents before the Eleventh Circuit and Appellants in this Court are the United States of America and the Federal Communications Commission. Intervenors on behalf of Respondents before the Eleventh Circuit and Appellants in this Court are Group W Cable, Inc., a New York corporation; National Cable Television Association, Inc., a District of Columbia corporation; and Cox Cablevision Corporation, a Georgia corporation.* Intervenor on behalf of Respondents before the Eleventh Circuit and Appellee supporting Appellants in this Court is Acton Corporation, a Delaware corporation.

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* *Statement pursuant to Supreme Court Rule 28.1:* Group W Cable, Inc., is a wholly owned subsidiary of Westinghouse Broadcasting and Cable, Inc., which in turn is a wholly owned subsidiary of the publicly-traded Westinghouse Electric Corporation. The following are non-wholly owned subsidiaries of Group W Cable, Inc.: Cable TV General, Inc.; Grosse Pointe Cable, Inc.; Group W Cable of Columbia Heights/Hilltop, Inc.; and El Paso Cablevision, Inc. The following are affiliates of Group W Cable, Inc.: Group W Cable of Chicago, Inc.; Group W Radio, Inc.; Group W Radio, Inc. (Cal.); Group W Radio, Inc. (Colo.); Group W Radio, Inc. (Mass.); Group W Television, Inc.; Group W Television, Inc. (Cal.); Group W Television, Inc. (Mass.); Westinghouse Broadcasting and Cable, Inc. (Cal.); and Westinghouse Broadcasting and Cable, Inc. (Mass.). Westinghouse Electric Corporation and Westinghouse Broadcasting and Cable, Inc., have entered into an agreement to sell all of the issued and outstanding shares of common stock of Group W Cable, Inc., to the following purchasers: American Television and Communications Corporation; Century Southwest Cable Television, Inc.; Comcast Corporation; Daniels & Associates, Inc.; and Tele-Communications, Inc. Group W Cable, Inc., expects the sale to close in June 1986.

Cox Cablevision Corporation is a wholly owned subsidiary of Cox Cable Communications, Inc., which in turn is wholly controlled by Cox Communications, Inc., which in turn is a wholly

Petitioner before the Eleventh Circuit and Appellee in this Court is Florida Power Corporation, a Florida corporation. Intervenors on behalf of Petitioner before the Eleventh Circuit and Appellees in this Court are Tampa Electric Company, a Florida corporation; Mississippi Power & Light Company, a Mississippi corporation; Alabama Power Company, an Alabama corporation; and Arizona Public Service Company, an Arizona corporation.

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owned subsidiary of Cox Enterprises, Inc., a privately held corporation.

National Cable Television Association, Inc., is a non-profit trade association primarily of cable television operators, with associate membership of programmers and suppliers. It considers its membership list to be proprietary and confidential, but will endeavor to provide a list of members under seal upon request of this Court.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, from which this appeal is taken, appears at 772 F.2d 1537 and is reprinted at App. 1a. The memorandum opinion and order of the Federal Communications Commission vacated by the Eleventh Circuit is unreported, and is reprinted at App. 18a. The memorandum opinions and orders of the FCC's Common Carrier Bureau that were left standing by the full Commission's order are unreported, and are reproduced at App. 25a and 32a.

JURISDICTION

This action began when three pole attachment rate complaints were filed against Florida Power Corporation with the Common Carrier Bureau of the Federal Communications Commission pursuant to 47 U.S.C. § 224. [1] The Common Carrier Bureau substantially granted the relief requested in those complaints. App. 25a and 32a.

Florida Power filed applications for review of the Common Carrier Bureau's rulings by the full Commission. On September 28, 1984, the FCC denied those applications in a single order. App. 18a. Florida Power then petitioned the United States Court of Appeals for the Eleventh Circuit for review pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). On October 8, 1985, the Eleventh Circuit vacated the FCC's order and held that the 1978 federal Pole Attachment Act violates the Fifth Amendment to the United States Constitution. App. 1a. On November 12, 1985, the Court of Appeals denied Appellants' petitions for rehearing and suggestions for rehearing en banc (App. 45a), and on November 21, 1985, the judgment was issued as mandate. App. 43a. Notices of Appeal were filed in the Eleventh Circuit on December 10, 1985. App. 47a. Jurisdiction lies in this Court under 28 U.S.C. § 1252.

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The Fifth Amendment to the United States Constitution provides in pertinent part:

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1. Complaints were filed on November 18, 1980, by Group W Cable's predecessors-in-interest, Teleprompter Corporation and Teleprompter Southeast, Inc.; on February 20, 1981, by Acton CATV, Inc.; and on November 2, 1981, by Cox Cablevision Corporation.

> No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The full text of the 1978 Pole Attachment Act, Pub. L. No. 95-234, § 6, 92 Stat. 33, 35-36 (codified as amended at 47 U.S.C.A. § 224 (West Supp. 1985)), is reprinted at App. 49a.

STATEMENT OF THE CASE

Factual Background

As reflected in its legislative history, the Pole Attachment Act was enacted to curb extortionate pricing and other anticompetitive acts by public utilities in connection with the use of surplus space on their poles by cable television operators.

To bring information and entertainment to their customers, cable operators usually have no practical alternative to attaching their distribution wire to existing utility poles. [2] Electric and telephone utilities own and exercise exclusive control over these essential facilities by virtue of their government-authorized local monopolies. As then-House Communications Subcommittee Chairman Van Deerlin accurately concluded, for cable operators the public utilities run "the only game in town." [3]

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[2] The Act's legislative history indicates that most communities will not permit cable operators to construct a duplicate set of poles, and that installing cable equipment underground is often economically infeasible. *See, e.g.*, S. Rep. No. 580, 95th Cong., 1st Sess. 13 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 109, 121; H.R. Rep. No. 721, Part 2, 95th Cong., 1st Sess. 2-3 (1977) (supplemental report).

[3] Pole Attachment: Hearings on H.R. 15372 and H.R. 15268 Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess. 24 (1976).

Utilities across the country have long granted cable operators licenses to attach cable equipment to surplus, nonproductive space on utility poles. During the early development of cable television, the rates charged for these licenses reflected the slight cost attributable to the pole attachments. But in the late 1950s—once the attachment of cable equipment to utility poles became more widespread—utilities began to exploit their monopoly ownership of poles by demanding extortionate fees from cable operators for pole attachment service. [4] In 1976 the annual costs for pole attachments drained cable operators of more than half of their pretax profits. [5] And utilities threatened additional rate increases that would have virtually eliminated any remaining profitability for the cable television industry. [6] Due to the utilities' local monopolies, their pole rates were not negotiable. [7]

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4. The utilities' historic abuse of their monopoly position has been thoroughly documented by the federal courts, the FCC, and Congress. *See, e.g., General Tel. Co. of the Southwest* v. *United States*, 449 F.2d 846, 850-851 (5th Cir. 1971); *United Tel. Co.*, 40 F.C.C.2d 359, 361-368 (1973); *Better T.V., Inc. of Dutchess County, N.Y.*, 31 F.C.C.2d 939, 943-968 (1971); *TeleCable Corp.*, 19 F.C.C.2d 574, 578-591 (1969); S. Rep. No. 580, *supra* note 2, at 12-13; H.R. Rep. No. 721, *supra* note 2, at 2-5; H.R. Rep. No. 1630, 94th Cong., 2d Sess. 5 (1976).

5. Communications Act Amendments of 1977: Hearings on S. 1547 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation, 95th Cong., 1st Sess. 30-31 (1977) (hereinafter "1977 Hearings").

6. *Id.* These monopolistic practices were not confined to telephone utilities. By July 1977, 33 electric utilities had announced an overall rate increase of 55 percent. H.R. Rep. No. 721, *supra* note 2, at 5.

7. As the utilities themselves conceded, "[t]here was consultation and negotiation, but the figure proposed was the figure accepted." 1977 Hearings, *supra* note 5, at 183 (testimony of American Electric Power).

Concluding that these rates were anticompetitive and frustrated the provision of cable television service to the public, Congress enacted the 1978 Pole Attachment Act. [8] The Act authorizes the FCC to set "just and reasonable" pole attachment rates that recover "fully allocated costs" for the utility, *i.e.*, the utility's operating expenses and capital costs—including a reasonable rate of return—attributable to the portion of the usable pole space occupied by the cable attachment. [9] In calculating fully allocated costs, the FCC has the discretion to adopt any rate of return sufficient to meet the utility's investment-backed expectations.[10] The Commission's regulatory scheme implementing the Act has been reviewed and approved by both Congress and the courts.[11]

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8. Pub. L. No. 95-234, § 6, 92 Stat. 33, 35-36 (codified as amended at 47 U.S.C.A. § 224 (West Supp. 1985)) (reprinted at App. 49a). The Commission is authorized to regulate pole attachment arrangements under the Act only where these services are not similarly regulated by any state authority. 47 U.S.C. § 224(c).

9. 47 U.S.C. § 224(d)(1); S. Rep. No. 580, *supra* note 2, at 19-21. This maximum rate mirrors standard utility ratemaking principles. The rate base (pole investment) and annual expenses are recovered in addition to a return on investment. The FCC's usual practice has been to use the rate of return authorized by the relevant state utility commission. Cable operators pay a share of those costs and investment based on their use of the revenue-generating portion of the pole.

At a minimum, the statute guarantees that the utility will recover its "avoidable costs," or all costs directly attributable to the pole attachment. The FCC has, however, set rates at fully allocated costs in virtually every case.

10. *See Alabama Power Co.* v. *FCC*, 773 F.2d 362, 372 (D.C. Cir. 1985).

11. Since 1978 the Commission has resolved more than 100 pole attachment cases under the Act. By the Communications Amendments Act of 1982, Pub. L. No. 97-259, § 106, 96 Stat. 1087, 1091 (1982), Congress repealed a five-year "sunset" provision relating

Although the Pole Attachment Act authorizes rate regulation, it does not mandate access to poles by cable operators. The Act did not compel Florida Power or any other utility to enter pole attachment arrangements.[12] Indeed, the Act applies to Florida Power only because the utility agreed to permit such attachments,[13] fully aware that its rates, terms, and conditions would be subject to FCC regulation.[14]

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to the statutory formula, based on "evidence indicating the effectiveness of this provision." H.R. Rep. No. 765, 97th Cong., 2d Sess. 31 (1982) (conference report). In 1984 Congress again amended the Act to refine the regulatory relationship between the FCC and state agencies. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 4, 98 Stat. 2779, 2808-09 (1984). In 1981 the United States Court of Appeals for the District of Columbia Circuit upheld the FCC's basic regulatory scheme, *see Monongahela Power Co.* v. *FCC*, 655 F.2d 1254 (D.C. Cir. 1981) (per curiam), and since then the FCC's ratemaking methodology has been subjected to rigorous judicial review. *See, e.g., Texas Power & Light Co.* v. *FCC*, No. 84-4818 (5th Cir. March 17, 1986); *Alabama Power*, 773 F.2d at 366-372. In none of these cases did the court hold that the FCC lacks authority to regulate pole attachment rates.

12. *See, e.g.*, S. Rep. No. 580, *supra* note 2, at 16 ("S.1547, as reported, does not vest within a CATV system operator a right to access to a utility pole, nor does the bill, as reported, require a power company to dedicate a portion of its pole plant to communications use").

13. *Id.* ("FCC jurisdiction arises only where a pole, duct, conduit, or right-of-way has already been devoted to communications use, and the communications space must already be occupied by a cable television system").

14. Pole attachment legislation was introduced in Congress as early as August 1976, and the Act was signed into law in February 1978. Florida Power entered its pole attachment contract with Acton CATV in June 1980, more than two years after the Act was passed. It entered its contract with Group W Cable's predecessors in July 1977, well after pole attachment legislation was introduced. The Cox Cablevision contract was entered in 1963 by Florida Power and Cox's predecessor-in-interest for a term of at least one year, terminable thereafter at will on six-months notice. Florida Power continued the Cox Cablevision contract throughout

Nor does the Act forever deprive Florida Power of the surplus space occupied by cable operators. Although the FCC has prevented a utility from evicting an attached cable operator in retaliation for exercising rights under the Act, [15] Florida Power may deny or reclaim pole space whenever it needs that space for utility service.[16] When pole space becomes inadequate for both cable and utility uses, Florida Power may reclaim the space, or require the cable operator to pay for taller poles as a condition for continued

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the entire period that pole attachment legislation was pending before Congress, and the arrangement continued until August 1985, at which time Cox sold the cable system covered by the contract to a subsidiary of Storer Communications, Inc. Thus, the utility voluntarily entered or has continued the contracts at issue with full knowledge that its rates would be subject to FCC regulation.

15. The Act's legislative history makes plain that the FCC may prohibit retaliatory eviction and prevent utilities from terminating pole attachment arrangements due to a cable operator's unwillingness to pay illegal fees. *See, e.g.*, S. Rep. No. 580, *supra* note 2, at 16.

16. The record shows that Florida Power permits cable attachments only on poles "where, in [Florida Power's] judgment, such use will not interfere with its own service requirements." *E.g.*, Attachment Agreement Between Florida Power Corporation and Teleprompter Corporation and Teleprompter Southeast, Inc. § 0.3 (July 1, 1977) (attached to Complaint (Nov. 18, 1980) filed in *Teleprompter Corp.* v. *Florida Power Corp.*, File No. PA-81-0008 (Common Carrier Bur. July 16, 1981)). Florida Power may deny attachment to certain poles that "are required for the sole use of [Florida Power]," or "would not readily lend themselves to attachments," or "have been installed primarily for the use of a third party." *Id.* § 1.2.

access.[17] Florida Power may also remove poles it no longer needs even if occupied by a cable operator.[18]

Pole attachment rate regulation does not diminish the return that Florida Power receives on its poles. Florida Power's overall revenue, or "revenue requirement," is set by the Florida Public Service Commission. If there are no cable attachments on a utility pole, the utility receives a return on its pole investment entirely from its general ratepayers. Pole attachment fees do not increase the utility's overall revenues, but simply offset to a minor degree the amount required from the utility's general ratepayers to provide a reasonable return on its investment. If those pole attachment fees are reduced, the general revenue requirement may be adjusted to compensate. By regulating pole attachment rates, Congress has not deprived Florida Power of revenue, but has merely determined the extent to which Florida Power's general utility customers should benefit—through marginally lower service rates—from the use of otherwise nonproductive pole space by cable operators. The Act thus reflects a congressional adjustment of the extent to which cable operators may fairly be required to meet the utility's revenue requirement.[19]

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17. *Id.* § 2.4 (requiring advance payment of "entire estimated non-betterment portion of the cost and expense" of new taller poles, including cost of removal and expense of transferring Florida Power facilities from old to new poles).

18. *Id.* § 13.2.

19. Florida Power acknowledged below that pole attachment regulation merely "serves to transfer monies from Florida Power's electric power users to two * * * telecommunications companies." Brief of Petitioner Florida Power Corp. Before the Eleventh Circuit, at 14, 37-39 (Dec. 27, 1984) (hereinafter "Florida Power Brief").

The Proceedings Below

This proceeding began with the filing of three pole attachment rate complaints against Florida Power under the Act. *See* note 1, *supra*. Acting on delegated authority, the FCC's Common Carrier Bureau found that Florida Power's pole attachment rates exceeded the statutory maximum and reduced the rates based on Florida Power's fully allocated costs, including its state-authorized rate of return. App. 25a and 32a. On September 28, 1984, the full Commission denied Florida Power's applications for review, expressly rejecting the utility's contention that pole attachment regulation constitutes a taking under the Fifth Amendment. App. 18a.

On petition for review by the Eleventh Circuit, no party requested that the Act be declared unconstitutional.[20] Nevertheless, the Eleventh Circuit, *sua sponte*, struck down the Pole Attachment Act as unconstitutional in a *per curiam* opinion on grounds neither briefed nor argued by any party. The Court of Appeals ruled that the Act authorizes government-compelled permanent physical occupations of property, and effects a taking *per se* under *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). App. 8a-13a.

The Court of Appeals did not decide whether the rate set by the FCC constitutes just compensation under the Fifth Amendment. Although noting that "the FCC's Order did impose a rate which was arguably 'just' under the rule prescribed by Congress in the Act" (App. 2a), the court held that administrative agencies may not "determine what is or is not just compensation for purposes of the Fifth Amendment Takings Clause[.]" App. 13a. The Eleventh Circuit

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[20] In its opening brief to the Eleventh Circuit, Florida Power specifically stated that its "appeal [did] not involve a facial attack on the constitutionality of a legislative act." Florida Power Brief, *supra* note 19, at 35. Florida Power requested only that the specific rate set by the Commission be set aside, not that the entire Act be declared unconstitutional. *Id.* at 54.

stated that "Congress has usurped what has long been held an exclusive judicial function" by setting forth a statutory formula for just and reasonable pole rates. App. 16a. "Because the Act does not allow for a judicial determination of what constitutes just compensation," the court concluded, "it is in this court's opinion, unconstitutional." *Id.*

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The Eleventh Circuit declared the 1978 federal Pole Attachment Act unconstitutional on grounds neither briefed nor argued. In so doing, the court has invited the reimposition of monopolistic pole attachment rates by directly contradicting long-standing decisions of this Court, other Circuits, and state courts of last resort regarding two significant constitutional issues.[21] If allowed to stand, the decision will improperly undermine congressional efforts to regulate public utilities. It will also strip agencies of their authority to set just compensation under the Takings Clause, and frustrate the desire of Congress to promote "the widest possible diversity of information sources and services" through cable television.[22]

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[21] Florida Power acknowledged below that the constitutional issues raised by this case—including the applicability of *Loretto*—are issues "of first impression" and of "unusual importance." Florida Power Brief, *supra* note 19, at v.

[22] 47 U.S.C.A. § 521 (West Supp. 1985). Even at regulated rates, pole attachment fees are a significant cost factor for cable operators. In 1985 cable operators paid utilities approximately $87,400,000 in pole fees. *See* Paul Kagan Associates, Inc., *Cable TV Franchising*, at 3 (Oct. 14, 1985). It has been estimated that "[w]ithout regulation, pole fees could quickly rise to more than $300 mil[lion]/year." *Id.* Florida Power argued before the FCC that a rate of $16.94 per pole was appropriate (App. 27a), almost ten times the $1.79 rate the Commission established as just and reasonable. App. 29a, 39a. Invalidation of the Act would plainly realize Congress' worst fears regarding utility frustration of cable

As shown below, the panel plainly erred in applying *Loretto*'s *per se* test to public utility plant, property already subject to physical occupations as the *quid pro quo* for the utility's government-authorized monopoly. *See* Section I.A. Even if the *per se* test could properly apply to property already dedicated to utility service, it is inapplicable here because the pole attachment arrangements at issue are neither permanent nor government-compelled. *See* Section I.B. Moreover, the Eleventh Circuit contravened long-standing precedent in holding that administrative agencies may not set just compensation for takings, subject to judicial review. *See* Section II.

I. The Pole Attachment Act Does Not Effect a Taking of Property.

A. The FCC's Regulation of Pole Attachment Arrangements Constitutes Proper Regulation of Public Utility Property and Guarantees the Utility a Constitutional Rate of Return.

The Eleventh Circuit held below that a government-authorized permanent physical occupation of public utility property at a regulated rate constitutes a taking *per se* under *Loretto*. In describing *Loretto*'s "very narrow" *per se* rule (458 U.S. at 441), however, this Court understood that it would apply only when the occupation at issue was "of such a *unique* character that it is a taking without regard to other factors that a court might ordinarily examine." 458 U.S. at 432 (emphasis added). In contrast, the Eleventh Circuit applied the rule to commonplace regulation: rate regulation of a service provided by a utility involving physical attachment to property already dedicated to utility service.

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television service to the public. The Eleventh Circuit's decision has cast a cloud over more than 6600 cable television systems serving almost 40 million subscribers.

For more than a century, this Court has recognized that governments may regulate businesses "affected with a public interest," especially public utilities.[23] Government regulation of public utility property frequently goes beyond mere rate regulation, often requiring non-discriminatory service, interconnections with other utilities or businesses, and other public benefits that entail physical attachments to utility property at regulated rates.[24]

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23. *Munn* v. *Illinois*, 94 U.S. 113, 125-132 (1877); *accord*, *Smyth* v. *Ames*, 169 U.S. 466, 544-546 (1898).

24. Public utilities are commonly described as "those enterprises which supply, directly or indirectly, continuous or repeated services through more or less *permanent physical connections* between the plant of the supplier and the premises of the consumer * * * ." J. Bonbright, *Principles of Public Utility Rates* 4 (1961) (emphasis added).

Utilities are also compelled to interconnect with other businesses and to suffer other permanent physical occupations at regulated rates. *See, e.g.*, *American Paper Inst., Inc.* v. *American Elec. Power Serv. Corp.*, 461 U.S. 402, 418-423 (1983) (upholding rules requiring power companies to make physical connections with qualifying cogenerators at regulated rates); *Gainesville Utils. Dept.* v. *Florida Power Corp.*, 402 U.S. 515, 521-529 (1971) (upholding FPC enforcement of rules requiring power companies to interconnect with cogenerators at regulated rates); *Pennsylvania Water & Power Co.* v. *FPC*, 343 U.S. 414, 422-424 (1952) (upholding FPC order requiring continued integration of electric power facilities); *Illinois Natural Gas Co.* v. *Central Ill. Pub. Serv. Co.*, 314 U.S. 498, 507-508 (1942) (noting FPC authority to order physical connection of gas transportation facilities under Natural Gas Act); *Southern Pac. Transp. Co.* v. *ICC*, 736 F.2d 708, 722-724 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1171 (1985) (upholding ICC authority to require rail carrier to give access to terminal facilities and tracks to other rail carriers); *MCI Telecommunications Corp.* v. *FCC*, 580 F.2d 590, 594-600 (D.C. Cir.), *cert. denied*, 439 U.S. 980 (1978) (requiring telephone company to furnish local physical interconnection to another carrier); *Bell Tel. Co. of Pa.* v. *FCC*, 503 F.2d 1250, 1254-63 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975) (upholding FCC order requiring physical interconnection of communication common carriers); *General Tel. Co. of the Southwest*, 449 F.2d at 852-858 (upholding FCC rules requiring telephone

The rationale underlying regulatory statutes like the Pole Attachment Act is self-evident. Governments authorize utilities to provide certain essential services, and confer on them a monopoly and other economic benefits not accorded private businesses. Government regulation of utility rates and services is a legislative substitute for competition intended to prevent monopoly abuse by the utility, and is the *quid pro quo* for a government-authorized monopoly.[25]

Treating such regulation as a *per se* taking would be incongruous because utilities achieve their monopoly position in part through takings of private property. The government affords utilities eminent domain power and access to public rights-of-way to serve the public, but these benefits result in a monopoly. To permit Florida Power to exploit its monopoly position in charging for services directly involving its dedicated utility plant would defeat the purpose for giving it eminent domain power in the first place.[26]

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companies wishing to provide leased channel service to make pole or conduit space available to cable television operators); *Guardband Decision*, 12 F.C.C.2d 841, 846, *recon. denied*, 14 F.C.C.2d 269 (1968), *aff'd sub nom. Radio Relay Corp.* v. *FCC*, 409 F.2d 322 (2d Cir. 1969) (establishing FCC rules requiring physical interconnection between telephone companies and radio common carriers).

25. *See Smyth*, 169 U.S. at 545-546.

26. In his recent major study of the Takings Clause, Professor Richard Epstein articulates this justification for utility regulation in terms of the "public use requirement." Because all takings of private property under the Fifth Amendment must be for a public use, a utility should not be permitted to appropriate any surplus wealth by exploiting the monopoly position it acquired through eminent domain. Otherwise, the utility would benefit disproportionately from its eminent domain power in violation of the public use requirement. R. Epstein, *Takings: Private Property and the Power of Eminent Domain*, at 274-276 (1985).

From an economic perspective, utility regulatory schemes like the Pole Attachment Act serve to create and then to distribute surplus wealth equitably. The utility's power of eminent domain assists in the creation of surplus wealth, the difference between

A utility's government-authorized monopoly does not, of course, deprive the utility of constitutional protection. The Fifth Amendment requires that utilities receive a reasonable "non-confiscatory" return for services they provide,[27] as the Pole Attachment Act provides Florida Power.[28] It is constitutionally sufficient that government regulation provide that the utility receive no more than a reasonable return for its services. Where, as here, it is necessary to regulate rates imposed for a service involving physical occupation of utility plant to prevent exploitation of the utility's government-assisted monopoly, this regulation should not be deemed to be a *per se* taking.

Apparently focusing only on superficial similarities between this case and *Loretto*, the Eleventh Circuit ignored these hornbook considerations and failed even to discuss this Court's long-standing precedent upholding public utility regulation under the Fifth Amendment. The Pole Attachment Act, like many other utility regulations, prevents a utility from exploiting its exclusive control of utility facilities. If the Eleventh Circuit's holding below were allowed to stand, a taking could occur any time a utility is required to provide services to a customer or to interconnect with another business at a regulated rate. Workaday utility

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what consumers are willing to pay and what they do pay. Through rate regulation, the government redistributes that surplus wealth to the public.

27. *See, e.g., Permian Basin Area Rate Cases*, 390 U.S. 747, 768-770 (1968); *Lindheimer* v. *Illinois Bell Tel. Co.*, 292 U.S. 151, 164 (1934).

28. The pole attachment rate at issue is based on a return of 9.31 percent (App. 39a), Florida Power's state-authorized rate of return. *See* Affidavit of Gary E. Clayton, at 3, ¶10 (Jan. 16, 1981) (attached to Response of Florida Power Corp. (Jan. 27, 1981) filed in *Teleprompter Corp.* v. *Florida Power Corp.*, PA-81-0008 (Common Carrier Bur. July 16, 1981)).

regulation could not take place without raising a constitutional issue at every turn.[29]

The inappropriateness of applying *Loretto*'s *per se* rule to public utility property is perhaps best demonstrated by analyzing pole attachment regulation under this Court's traditional multi-factor balancing test for takings.[30] The traditional analysis looks to "such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations."[31] If the governmental action here is not a taking under the traditional test, it can hardly be found to be a *per se* taking under *Loretto*'s narrow analysis.

The character of the government action at issue—regulation of rates for a service that entails physical occupation of utility property—is commonplace, and is necessary to prevent exploitation of the utility's government-conferred monopoly. Moreover, pole attachment regulation causes no economic loss and interferes with no investment-backed expectations. Florida Power's poles are part of the company's regulated investment and expense, generating an

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29. Although the Eleventh Circuit did not decide whether states could impose regulation like the Pole Attachment Act (App. 17a), any basis for distinguishing between state and federal regulation under the Takings Clause appears to be questionable. The panel's opinion thus implicates state as well as federal regulation.

30. This Court has frequently stated that antitrust *per se* rules should not be extended to a new business practice unless the judiciary has had "considerable experience" in striking down that practice under the rule of reason. *E.g.*, *Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1, 9 (1979); *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 607-608 (1972). The vast experience this Court has in *upholding* utility regulation like the Pole Attachment Act clearly counsels against application of a *per se* takings rule in this case.

31. *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 83 (1980); *accord*, *Connolly* v. *Pension Benefit Guaranty Corp.*, 106 S. Ct. 1018, 1026 (1986).

element of the company's revenue requirement met by its ratepayers. The Act merely describes principles governing how much of that revenue requirement can be recovered from cable companies. As Florida Power acknowledged explicitly below, it suffers no loss as a result of the Act,[32] and thus no taking has occurred.[33] Congress has simply adjusted the rates to be charged to different classes of customers, a function undoubtedly within the province of the legislature.[34]

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32. Florida Power Brief, *supra* note 19, at 14, 37-39.

33. *See Kansas City Power & Light Co.* v. *State Corp. Comm'n*, No. 58293 (Kan. Feb. 21, 1986) (no uncompensated taking occurs where power company is required to purchase energy from cogenerator attached to its plant but power company is reimbursed by ratepayers for all sums paid to cogenerator).

34. *See, e.g., National Ass'n of Greeting Card Publishers* v. *United States Postal Service*, 462 U.S. 810, 821-823 (1983); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976).

Since *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944), courts have limited utilities' measure of compensation to historic cost rather than market value. The "market value" rate requested by Florida Power below would represent compensation to the utility that is far greater than that which the utility could reasonably expect in investing in its poles. By recovering for Florida Power the fully allocated cost of its pole space measured in terms of the net book value of relevant plant and related expenses, the Pole Attachment Act affords precisely the compensation the utility expected in erecting and maintaining its poles. Thus, even if the Act effected a taking, the taking would be constitutional because Florida Power is guaranteed just compensation. *See Kansas City Power & Light Co.*, *supra* note 33 (unnecessary to decide whether government-compelled physical interconnection with utility plant by cogenerator is a taking under *Loretto* because cogenerator pays utility adequate compensation based on cost of connection).

B. Even If *Loretto*'s *Per Se* Rule Applied to Public Utility Property, the Pole Attachment Act Would Not Effect a Taking.

Even if *Loretto*'s narrow *per se* rule could properly be applied to public utility property, it would be inapplicable here because there has been no government-compelled permanent physical occupation. In *Loretto* this Court reviewed a state statute requiring apartment owners to permit cable operators to place equipment on their roofs, and held that such a government-compelled permanent physical occupation is a taking *per se*. 458 U.S. at 426. Here, the Eleventh Circuit found both government compulsion and permanency based on the FCC's ability to prevent utilities from evicting cable operators in retaliation for rate complaints. App. 11a-12a.

In applying *Loretto*'s *per se* rule, however, the Eleventh Circuit failed to consider Florida Power's ability to reclaim pole space occupied by a cable operator any time that space is needed for utility service. *See* pages 7-8, *supra*. Under *Loretto* only a permanent occupation constitutes a *per se* taking because only a permanent occupation forever deprives the owner of the basic rights of possession and control.

> First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. * * * Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property. [458 U.S. at 435-436.]

Unlike the statutory scheme addressed in *Loretto*, Florida Power's pole attachment arrangements are far from permanent. Cable operators have only a limited revocable right to remain on Florida Power's poles. The pole space afforded cable operators and regulated under the Act is always available to the utility if needed.[35]

In effect, the Court of Appeals improperly rewrote the "very narrow" holding in *Loretto* from one requiring a *permanent* physical occupation to one requiring merely a *direct* physical occupation.[36] In *Loretto*, however, this Court specifically distinguished and sustained rent control statutes with guaranteed temporary tenancies and other tempo-

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35. In *Loretto* the Court relied (458 U.S. at 428) on the "closely analogous" case of *St. Louis* v. *Western Union Tel. Co.*, 148 U.S. 92 (1893), where the occupation at issue—the placement of poles on public streets—was an "exclusive and permanent one." *Id.* at 98. The city could exact reasonable compensation because "the use made by the telegraph company * * * effectually and permanently dispossesse[d] the general public as if it had destroyed that amount of ground." *Id.* at 99. In contrast, Florida Power has not been permanently dispossessed of its pole space, but may reclaim that space whenever necessary to provide utility service.

36. App. 12a ("to the extent that a permanent physical occupation includes some element of permanency, we conclude that the instant case satisfies that element as set forth in *Loretto*"). The Eleventh Circuit adopted this interpretation of *Loretto* at the urging of Florida Power. *See* Florida Power Brief, *supra* note 19, at 24 ("[p]ermanent physical occupation [under *Loretto*], in short, means a direct physical attachment, not an occupation which must last forever").

rary occupations, stating, "[i]n none of these cases * * * did the government authorize the permanent occupation of the landlord's property by a third party." *Id.* at 440. By rewriting the *Loretto* test, the Eleventh Circuit not only has ignored this Court's painstaking analysis, but has also created a conflict with those Circuits that have refused to extend *Loretto* beyond permanent physical occupations.[37]

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[37] For example, in *Troy Ltd.* v. *Renna*, 727 F.2d 287 (3d Cir. 1984), the Third Circuit refused to apply *Loretto* to a statute that guaranteed a 40-year tenancy for qualified tenants. *Id.* at 291-292, 301-303. Although the statute clearly permitted physical occupations at regulated rates for several decades, the court held that the requisite permanency under *Loretto* was absent because the tenancies would eventually end through death, change in residence, or eviction on the narrow grounds specified in the statute. *Id.* at 301-303. Other courts have likewise rejected Takings Clause challenges to rent control and condominium conversion legislation that severely restricts property owners' ability to evict. *See, e.g.*, *Fisher* v. *City of Berkeley*, 37 Cal. 3d 644, 693 P.2d 261, 209 Cal. Rptr. 682 (1984), *aff'd on other grounds*, 106 S. Ct. 1045 (1986); *Nash* v. *City of Santa Monica*, 37 Cal. 3d 97, 688 P.2d 894, 207 Cal. Rptr. 285 (1984), *appeal dismissed for want of substantial federal question*, 105 S. Ct. 1740 (1985); *Terminal Plaza Corp.* v. *City & County of San Francisco*, No. A021611 (Cal. Ct. App. Feb. 24, 1986); *Flynn* v. *City of Cambridge*, 383 Mass. 152, 418 N.E.2d 335 (1981), *aff'd by an equally divided court sub nom. Fresh Pond Shopping Center, Inc.* v. *Rent Control Board of Cambridge*, 388 Mass. 1051, 446 N.E.2d 1060, *appeal dismissed for want of substantial federal question sub nom. Fresh Pond Shopping Center, Inc.* v. *Callahan*, 464 U.S. 875 (1983).

Loretto is also inapplicable here because Florida Power was not compelled by the government to permit the occupation at issue. The state statute addressed in *Loretto* mandated access for cable equipment, regardless whether the private property owner had previously offered space to cable operators.[38] Unlike the statute in *Loretto*, the Pole Attachment Act does not mandate access.[39] And unlike the apartment owner in *Loretto*, who never agreed to the placement of cable equipment on her roof,[40] Florida Power agreed to its pole attachment arrangements. The utility entered or continued those arrangements with full knowledge that they would be subject to FCC regulation. *See* note 14, *supra*.[41] It is settled beyond dispute that rates charged for the consensual use of bottleneck facilities like Florida Power's poles may be regulated without violating the Fifth Amendment.[42] Accordingly, the holding below that pole

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38. *See Loretto*, 458 U.S. at 423-424.

39. *See* S. Rep. No. 580, *supra* note 2, at 16.

40. *See Loretto*, 458 U.S. at 422-424.

41. *See Ruckelshaus* v. *Monsanto Co.*, 104 S. Ct. 2862, 2875-76 (1984) (no regulatory taking of trade secrets by EPA where owner submits secrets after effective date of regulation).

42. *See, e.g., Munn*, 94 U.S. at 132 (upholding regulation of rates charged by grain elevator operators who "stand * * * in the very 'gateway of commerce' and take a toll from all who pass"); *Whalers' Village Club* v. *California Coastal Comm'n*, ___ Cal. App. 3d ___, 220 Cal. Rptr. 2, 11-12 (Ct. App. 1985) (*Loretto* inapplicable to government-compelled dedication of public access easement where property owners' action triggered need for police power regulation).

Once cable operators have invested millions of dollars in systems attached to poles in reliance on a utility's voluntary decision to permit them to do so, the utility should not be allowed to avoid valid regulation of attachment rates. *See Rivera* v. *R. Cobian Chinea & Co.*, 181 F.2d 974, 977 (1st Cir. 1950) ("it was within the power of the Legislature to regulate the procedure for the eviction of tenants * * * in view of the fact that such procedure might be

attachment regulation constitutes a taking *per se* should be reversed.

II. Even If Pole Attachment Regulation Were a Taking, Congress May Authorize an Administrative Agency to Determine Just Compensation Pursuant to Statutory Guidelines, Subject to Judicial Review.

Having held that pole attachment regulation effects a taking *per se*, the Eleventh Circuit struck down the Pole Attachment Act without further analysis. It did not determine whether the rates set by the FCC in this case contravene the statutory definition of just compensation. Nor did it hold that this statutory definition is constitutionally inadequate. Instead, the court wiped out the entire regulatory scheme *sua sponte* solely because Congress has authorized an administrative agency to determine compensation under certain guidelines. It apparently made no difference to the court that any such determination is subject to judicial review, as evidenced by this very case.

The Eleventh Circuit has, in effect, stripped every administrative agency of its authority to set compensation for takings, regardless whether judicial review is available. If allowed to stand, its decision not only would deny the FCC the ability to regulate pole attachment rates, but would prevent other administrative agencies from setting just compensation for takings. For example, the Environmental Protection Agency could no longer set compensation for

availed of by landlords to circumvent the maximum rent ceilings which it was the primary purpose of the Legislature to impose"); *Nash*, 37 Cal. 3d at 102, 688 P.2d at 898, 207 Cal. Rptr. at 289 (city rent control ordinance restricting landlord's ability to evict tenants not a taking).

takings of trade secrets under the Federal Insecticide, Fungicide and Rodenticide Act.[43] Similarly, the Interstate Commerce Commission could not determine just compensation for takings of railroad property under the Staggers Rail Act of 1980.[44]

The Eleventh Circuit plainly erred in holding that an administrative agency may not in the first instance set just compensation for a taking. This Court has long held that agencies like the FCC may determine just compensation when review by the courts is available:

> By the Constitution of the United States, the estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury; *but may be entrusted by Congress to commissioners appointed* by a court or *by the executive*, or to an inquest consisting of more or fewer men than an ordinary jury. [*Bauman* v. *Ross*, 167 U.S. 548, 593 (1897); emphasis added.]

Indeed, in eminent domain proceedings, the assessment of just compensation by "a commission, or board, * * * or other non-judicial tribunal, was so common in England and in this

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43. Although not addressing the precise issue, this Court has sustained the EPA's authority to make these determinations. *See Thomas* v. *Union Carbide Agricultural Prods. Co.*, 105 S. Ct. 3325, 3334-39 (1985); *Monsanto*, 104 S. Ct. at 2878, 2881-83.

44. The Seventh Circuit sustained the ICC's methodology for setting just compensation for takings of railroad lines in *Chicago & N.W. Transp. Co.* v. *United States*, 678 F.2d 665 (7th Cir. 1982). Apparently, neither that court nor any party questioned the agency's authority to determine just compensation in the first instance. Just last Term, this Court upheld the ICC's authority to make such determinations, and stated that the Commission's valuation might very well have preclusive effect in state condemnation proceedings under principles of *res judicata*. *See Hayfield N.R.R.* v. *Chicago & N.W. Transp. Co.*, 104 S. Ct. 2610, 2619 n.15 (1984).

country prior to the adoption of the Federal Constitution that it has been held repeatedly that * * * when opportunity to be heard is given it satisfies the requirements of due process of law, especially when, as in this case, a right of review in the courts is given." *Crane* v. *Hahlo*, 258 U.S. 142, 147 (1922). Numerous decisions of this Court,[45] the United States Courts of Appeals,[46] the Court of Claims,[47] and state courts of last resort[48] confirm that Congress may authorize

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45. *E.g.*, *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 123-131 (1950) (upholding agency determination of ceiling price of pepper as just compensation for taking of pepper); *Long Island Water Supply Co.* v. *Brooklyn*, 166 U.S. 685, 694-695 (1897) (just compensation may be awarded "by commissioners, at least where there is provision for a review of their proceedings in the courts"); *United States* v. *Jones*, 109 U.S. 513, 519 (1883) (just compensation may be determined by "commissioners or special boards or the courts, with or without the intervention of a jury, as the legislative power may designate"). *See generally The Constitution of the United States of America: Analysis and Interpretation*, S. Doc. No. 82, 92d Cong., 2d Sess. 1186 (1973).

46. *E.g.*, *Chicago & N.W. Transp. Co.*, 678 F.2d at 668-671 (upholding ICC determination of just compensation for taking of railroad property); *Monongahela*, 655 F.2d at 1256-57 (approving FCC's basic regulatory scheme under Pole Attachment Act and thus implicitly upholding Commission's authority to set pole attachment rates); *United States* v. *Hess*, 71 F.2d 78, 79-80 (8th Cir. 1934) (non-judicial tribunal may set just compensation); *see also Troy*, 727 F.2d at 300 ("[u]ntil the district court analyzes the compensation features of the statutory scheme to determine whether the level of [controlled rent] is adequate, it cannot find an uncompensated taking").

47. *Latvian State Cargo & Passenger S.S. Line* v. *United States*, 88 F. Supp. 290, 291-292 (Ct. Cl. 1950) (administrative agency may determine in the first instance just compensation for takings under Merchant Marine Act).

48. *E.g.*, *Marin Mun. Water Dist.* v. *Marin Water & Power Co.*, 178 Cal. 308, 314-316, 173 P. 469, 470-472 (1918) (legislature may authorize state railroad commission to determine just compensation); *State* v. *Heppenheimer*, 54 N.J.L. 268, 271-273, 23 A. 664, 665 (N.J. 1893) (governor may appoint commissioners to ascertain just

an agency to determine just compensation, subject to judicial review. Even where the right to judicial review is limited or withheld, determinations of just compensation by federal agencies are proper due to the availability of a claim under the Tucker Act[49] if the award is less than required by the Fifth Amendment.[50] *A fortiori*, such determinations are permissible here, where full judicial review is available.[51]

Nor is the Pole Attachment Act constitutionally infirm simply because it sets forth guidelines to be used by the FCC

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compensation subject to judicial review); *George* v. *Consolidated Lighting Co.*, 87 Vt. 411, 419-420, 89 A. 635, 638 (1914) (public service commission may determine just compensation); *State ex rel. Andrews* v. *City of Oshkosh*, 84 Wis. 548, 566-569, 54 N.W. 1095, 1100-01 (1893) (board of public works may determine just compensation subject to judicial review).

49. 28 U.S.C. § 1491 (1982).

50. *E.g.*, *United States* v. *Riverside Bayview Homes, Inc.*, 106 S. Ct. 455, 460 (1985) (Tucker Act "presumptively supplies a means of obtaining compensation for any taking that may occur through the operation of a federal statute"); *Monsanto*, 104 S. Ct. at 2869, 2880-82 (upholding statute authorizing agency to set compensation for takings with limited judicial review due to availability of Tucker Act remedy); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 154-156 (1974) (noting availability of Tucker Act claim to recover any shortfall between statutory remedy for taking and just compensation).

51. The Eleventh Circuit's contravention of this Court's binding precedent is betrayed by the very case on which it so heavily relies, *Loretto*. On remand of *Loretto* from this Court, New York's highest court directed the State Commission on Cable Television to determine just compensation. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 58 N.Y.2d 143, 153, 446 N.E.2d 428, 434, 459 N.Y.S.2d 743, 749 (1983). The New York Court of Appeals specifically rejected the argument that the United States Constitution prohibits the initial determination of just compensation by an administrative agency. *Id.*; *accord Princeton Cablevision, Inc.* v. *Union Valley Corp.*, 195 N.J. Super. 257, 270, 478 A.2d 1234, 1241 (1983) (compensation for *Loretto*-type taking should be set by board that oversees state cable television industry).

in its determination of a "just and reasonable" pole rate. The Eleventh Circuit's description of the statutory formula for pole rates as a "binding rule" is factually incorrect. In calculating fully allocated costs, the FCC has the discretion to adopt a rate of return sufficient to meet the utility's investment-backed expectations.[52] Moreover, even statutory "binding rules" for just compensation are valid if, upon judicial review, they are deemed to yield compensation that complies with the Takings Clause.[53]

In holding that agencies cannot set just compensation subject to judicial review, the Eleventh Circuit relied primarily on *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312 (1893).[54] But this Court has stated that *Monongahela* stands only for the proposition that just compensation—like all constitutional issues—is ultimately a judicial

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52. *Alabama Power*, 773 F.2d at 372.

53. *See, e.g., United States* v. *Cors*, 337 U.S. 325, 331-334 (1949) (upholding statutory definition of just compensation as "coterminous" with constitutional requirement); *Bauman*, 167 U.S. at 573-575 (upholding congressional requirement that just compensation for taking of land for highway be reduced by benefits resulting from highway to any land not taken). Even in a case relied on by the Eleventh Circuit, the Court of Claims stated that such statutory standards are entirely appropriate and "can be applied to a claim for just compensation if * * * reasonable and judicially acceptable." *Miller* v. *United States*, 620 F.2d 812, 837 (Ct. Cl. 1980).

54. The panel below not only misapplied the holding of *Monongahela*, but also mischaracterized the facts addressed in that case. Contrary to the Eleventh Circuit's description (App. 13a), *Monongahela* actually involved a statute requiring that the just compensation for a condemned lock and dam exclude the value of the owner's franchise to exact tolls. 148 U.S. at 327-328. This Court struck down that provision because it conflicted with the constitutional requirement of just compensation. *Id.* at 328. *Monongahela* does not hold, however, that just compensation can never be determined by an administrative agency in the first instance, subject to judicial review.

inquiry, and that therefore congressional standards of just compensation are subject to review by the courts:

> *Monongahela* did no more than restate the general principle that the courts, not the legislature, are ultimately entrusted with assuring compliance with constitutional commands.[55]

Even Appellee Florida Power recognized below that *Monongahela* stands for the simple proposition that a court must review government takings "to decide whether the fifth amendment's requirement of just compensation has been satisfied."[56] That point is undisputed. Indeed, the utility parties below requested the Eleventh Circuit to review the pole attachment rate set by the FCC to ensure that it is just and reasonable. But the Eleventh Circuit declined to do so, relying on its erroneous interpretation of *Monongahela*.[57]

Moreover in *Monongahela* this Court was concerned because the legislature both bought the property at issue and set the purchase price. *Id.* at 327. Here, there is no similar self-interested congressional action, and thus no due process or fairness concerns like those in *Monongahela*. The FCC acts as a disinterested objective arbiter in determining a proper and just rate for pole arrangements entered by two private parties. Neither Congress nor the FCC is acting as judge in its own case, as in *Monongahela*.

55. *Regional Rail Reorganization Act Cases*, 419 U.S. at 151 n.39. There, the contention was made that Congress may not "specify the form of [just] compensation but must leave the decision to the judiciary." *Id.* This Court rejected the argument as "based on an erroneous reading of *Monongahela*." *Id.*

56. Florida Power Brief, *supra* note 19, at 27.

57. The three lower court cases cited by the panel below similarly provide no support for its holding. As noted above, in *Miller* the Court of Claims specifically held that legislative guidelines for determining just compensation may be upheld if "reasonable and judicially acceptable." 620 F.2d at 837. Another case, *United States v. 15.3 Acres of Land*, 154 F. Supp. 770 (M.D. Pa. 1957), was subsequently reversed, 264 F.2d 112 (3d Cir.), *cert. denied*, 361 U.S.

This Court recently admonished against rigid, formalistic limitations on the authority of administrative agencies.[58] Through legislation like the Pole Attachment Act, Congress relieves federal courts of the burden of determining just and reasonable rates in the first instance, and places the initial responsibility for complex ratemaking in an expert agency. The statutory formula streamlines Commission procedures, and assures that a uniform standard of "just and reasonable" compensation is applied to the hundreds of utilities whose poles are regulated. Although the statutory formula and the FCC's order may be reviewed to ensure their constitutionality, the Eleventh Circuit's unprecedented refusal to do so improperly handcuffs Congress, and might require the federal judiciary to become a ratemaker in the first instance for hundreds or even thousands of pole attachment disputes. Moreover, the panel's decision if upheld may well compel federal courts to set compensation under other regulatory schemes that effect a taking of property. Nothing in the Takings Clause or in this Court's decisions requires this anomalous result.

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819 (1959), and in any event the district court affirmed a determination of just compensation set by a commission. 154 F. Supp. at 788. In *American-Hawaiian S.S. Co.* v. *United States*, 124 F. Supp. 378 (Ct. Cl. 1954), *cert. denied*, 350 U.S. 863 (1955), the court held only that administrative determinations of just compensation are subject to judicial review, not that agencies may never set just compensation in the first instance.

58. *See Thomas*, 105 S. Ct. at 3334-39.

CONCLUSION

For the reasons expressed above, this Court should note probable jurisdiction and reverse the judgment below.

Respectfully submitted,

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